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REPORT
106–159

FEDERALISM ACCOUNTABILITY ACT OF 1999

R E P O R T

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TOGETHER WITH

MINORITY VIEWS

TO ACCOMPANY

S. 1214

TO ENSURE THE LIBERTIES OF THE PEOPLE BY PROMOTING FEDERALISM, TO PROTECT THE RESERVED POWERS OF THE STATES, TO IMPOSE ACCOUNTABILITY FOR FEDERAL PREEMPTION OF STATE AND LOCAL LAWS, AND FOR OTHER PURPOSES

SEPTEMBER 16, 1999.—Ordered to be printed

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SEPTEMBER 16, 1999.—Ordered to be printed

Mr. THOMPSON, from the Committee on Governmental Affairs, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 1214]

The Committee on Governmental Affairs, to which was referred the bill (S. 1214) to ensure the liberties of the people by promoting federalism, to protect the reserved powers of the states, to impose accountability for federal preemption of state and local laws, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends by a vote of 8–2 that the bill as amended do pass.

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I. PURPOSE AND SUMMARY

S. 1214 is a bipartisan effort to achieve meaningful improvements to our federal system of government through important changes in the preemption doctrine and the process for passing legislation and promulgating federal regulations. S. 1214 would promote restraint in the exercise of federal power. It would encourage Congress and the federal agencies to think carefully before deciding

whether or not to preempt state and local law and, if so, to use express preemption clauses. S. 1214 is intended to ensure that the interests of state and local governments, and the people they serve, are given due consideration by the Federal Government. Upon introduction of S. 1214, Chairman Thompson stated:

> The Founders created a dual system of governance for America, dividing power between the Federal Government and the States. The Tenth Amendment makes clear that States retain all governmental power not granted to the Federal Government by the Constitution. * * * At the same time, the Supremacy Clause states that Federal laws made pursuant to the Constitution shall be the supreme law of the land. The "Federalism Accountability Act" is intended to require careful thought and accountability when we reconcile the competing principles embodied in the Tenth Amendment and the Supremacy Clause.[1]

A brief synopsis of the major provisions of the bill follows:

A. STATEMENTS IN COMMITTEE OR CONFERENCE REPORTS

In the report accompanying any bill or joint resolution reported from a committee or conference of the Senate or House, Congress would be required to make an explicit statement on the extent to which the bill or joint resolution is intended to preempt state or local law and to provide an explanation of the reasons for such preemption.

B. RULE OF CONSTRUCTION RELATING TO PREEMPTION

S. 1214 would establish a rule of construction on preemption. No federal statute or federal rule enacted or promulgated after the effective date of the Act would be construed to preempt state or local law unless the statute or rule explicitly states that such preemption was intended or unless there is a direct conflict between such statute or rule and state or local law.

C. AGENCY FEDERALISM ASSESSMENTS

Agencies would designate a federalism officer to implement the requirements of the Act and to serve as a liaison to state and local officials. Early in the process of developing rules, federal agencies would be required to notify, consult with, and provide an opportunity for meaningful participation by state and local government officials or their representative organizations. The agencies would prepare a federalism assessment for rules that have federalism impacts. Each federalism assessment would include an analysis of the following: whether, why, and to what degree the federal rule preempts state law; other significant impacts on state and local governments; measures taken by the agency, including the consideration of regulatory alternatives, to minimize the impact on State and local governments; and the extent of the agency's prior consultation with public officials, the nature of their concerns, and the extent to which those concerns have been met. The federalism assessment would be included in the rulemaking record for purposes

[1] 145 Cong. Rec. S6872 (daily ed. June 10, 1999).

of judicial review and would be considered by the court in determining whether the final rule as a whole is arbitrary or capricious. In addition, if the agency fails to perform the federalism assessment, or to undertake any consultation, the court also may remand or invalidate the rule, and the adequacy of compliance with the specific federalism assessment requirements shall not otherwise be grounds for remanding or invalidating the rule. Only state or local governments, or their representative organizations, would have standing to challenge noncompliance with the consultation and federalism assessment requirements.

D. GOVERNMENT PERFORMANCE AND RESULTS ACT PERFORMANCE MEASURES

The Act amends the Government Performance and Results Act of 1993 to clarify that performance measures for state-administered grant programs are to be determined in consultation with public officials.

E. CONGRESSIONAL BUDGET OFFICE PREEMPTION REPORT

The Act would require the Congressional Budget Office ("CBO"), with the help of the Office of Management and Budget and the Congressional Research Service, to compile a report on preemptions by federal rules, court decisions, and legislation.

F. FLEXIBILITY AND FEDERAL INTERGOVERNMENTAL MANDATES

The Act amends the Unfunded Mandates Reform Act of 1995 to clarify that major new requirements imposed on states under entitlement authority are to be scored by CBO as unfunded mandates. It also requires that, where Congress has capped the federal share of an entitlement program, the Committee report and the accompanying CBO report must analyze whether the legislation includes new flexibility or whether there is existing flexibility to offset additional costs.

II. BACKGROUND AND NEED FOR LEGISLATION

Our constitutional federalism has been called the greatest charter for liberty, wealth creation, and community in political history. It was the Founders' brilliant solution to the greatest of political dilemmas: How could a government be made strong enough to protect liberty and property, without making it so strong it could oppress its citizens and expropriate their wealth? The Founders concluded that two interlocking governments—federal and state—would lead to less and better government than a unitary government.[2]

In the Constitution, the Founders carefully enumerated the powers of the Federal Government and divided government power between the Federal Government and the States. The Federal Government's basic domestic responsibility was to ensure free flow of goods and people, as reflected in the Commerce Clause. The Founders also provided the Federal Government with a limited trump

[2] Testimony of Professor John O. McGinnis, Benjamin N. Cardozo School of Law, before the Senate Governmental Affairs Committee, May 5, 1999.

card, the Supremacy Clause, in the event of a conflict between federal and state law. The Framers envisioned a Federal Government capable of solving national problems, but just as surely they envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government, but also between the Federal Government and the States.[3]

During the debates on the Constitution between 1787 and 1788, many observers worried that the generality of the document, combined with the Supremacy Clause, would allow a centralization of power in the hands of the Federal Government beyond the limited enumerated powers granted to it. Much of the initial opposition to the Constitution was rooted in the fear that the Federal Government would become too powerful and would eliminate the States as viable political entities. Samuel Adams, for example, worried that if the several states were to be joined in "one entire Nation, under one Legislature, the Powers of which shall extend to every Subject of Legislation, and its Laws be supreme & controul the whole, the Idea of Sovereignty in these States must be lost."[4] Similarly, George Mason argued that "the general government being paramount to, and in every respect more powerful than the state governments, the latter must give way to the former."[5]

This concern was so strongly voiced that the proponents of the Constitution assured that a Bill of Rights, including a provision explicitly reserving powers in the States, would be a top priority for the new Congress. The Tenth Amendment was added soon after ratification in 1791. It emphasizes:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The drafters of the Constitution believed that to protect liberty, power should be divided between the Federal and State Governments so that "[a]mbition be made to counteract ambition."[6] They described this new form of government as "in strictness, neither a national nor a federal Constitution."[7] Madison explained the division of power by contrasting the attributes of a "national" government with the federal system of governance established by the Constitution. He explained that while a national government would possess an "indefinite supremacy over all persons and things," the government established by the Constitution consisted of "local or municipal authorities [which] form distinct and independent portions of the supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them, within its own sphere."[8] In this "compound republic of America," Madison said, "[t]he different governments will control

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[3] *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 581 (Rehnquist, C.J., dissenting) (citing *FERC* v. *Mississippi*, 546 U.S. 742, 790 (1982)).

[4] Letter from Samuel Adams to Richard Henry Lee (Dec. 3, 1787), reprinted in "Anti-Federalists versus Federalists" 159 (J. Lewis ed. 1967).

[5] Address in the Ratifying Convention of Virginia (June 4–12, 1788), reprinted in "Anti-Federalists versus Federalists", supra, at 208–09.

[6] The Federalist No. 51 (James Madison).

[7] The Federalist No. 39 (James Madison).

[8] Id.

each other, at the same time that each will be controlled by itself."[9]

While the Constitution limited the powers of Federal Government, and the Federal Government checked the States in limited areas such as interstate commerce, the States also were limited by competition among themselves. Federalism created a marketplace among governments. Citizens could vote with their feet and take themselves and their wealth elsewhere if subject to abuse.[10]

The benefits of federalism are many. It limits the power of government to preserve liberty. It also creates an efficient marketplace for government. States compete with each other for citizens' business, taxes, and talent. That, in turn, fosters a healthy business climate. Local governments can tailor their policies to the needs and values of the community and thereby increase the satisfaction of their citizens. Federalism also fosters experimentation among the laboratories of democracy. As Justice Brandeis stated in an oft-quoted passage, "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[11] The best ideas that emerge from innovative states can then be adopted elsewhere. This experimentation is crucial to address major problems like welfare reform and education. Federalism also increases civic responsibility.[12]

Charged with the duty to oversee Federal-State relations,[13] the Committee is mindful of the principles of federalism. As Justice Black eloquently stated:

> [O]ne familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." * * * What the concept [represents] is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and future.[14]

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[9] The Federalist No. 51.

[10] Michael S. Greve, "Real Federalism: Why It Matters, How It Could Happen", American Enterprise Institute (1999).

[11] *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[12] See Testimony of Professor John O. McGinnis, Benjamin N. Cardozo School of Law, before the Senate Governmental Affairs Committee, May 5, 1999; Statement of Adam D. Thierer, Heritage Foundation, before the Senate Governmental Affairs Committee, May 5, 1999; Testimony of Professor William Galston, University of Maryland School of Public Affairs, before the Senate Governmental Affairs Committee, May 5, 1999.

[13] Standing Rules of the Senate, S. Doc. No. 8, 104th Cong., 1st Sess. 28–29 (1995).

[14] *Younger* v. *Harris*, 401 U.S. 37, 44–45 (1971) (stating that federal judges should be directed by comity, the proper respect for State functions).

Unfortunately, we have strayed far from the Founders' vision.[15] As Justice O'Connor put it, "[t]he Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses: first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities."[16]

Undoubtedly, there are many causes of the decline of federalism. Although the Framers expected that the composition of Congress would make it reluctant to invade State sovereignty, "a variety of structural and political changes occurring in this century have combined to make Congress particularly insensitive to State and local values."[17] The 16th Amendment authorized a Federal income tax that allowed the rapid growth of the Federal Government in the 20th century. The 17th Amendment ended the election of Senators by State legislators. Political parties weakened on the local level, and the national media ascended. The emergence of an industrialized national economy was accompanied by a breathtaking expansion of Federal legislation and regulation.

Two major developments in the Court's jurisprudence in early 20th century profoundly altered the character of our federal system. First, the unequivocal recognition of a congressional power of preemption became an intrinsic part of the vast expansion of federal powers. The Supremacy Clause states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State *to the Contrary* notwithstanding.[18]

The plain language of the Supremacy Clause indicates that it was to serve as a conflict resolution mechanism in particular cases.[19] A specific state statute should be trumped if it conflicts with federal law without depriving the state of all concurrent lawmaking power in that area. Starting in the second decade of the twentieth century,[20] however, the Court's preemption doctrine evolved beyond a conflict resolution mechanism into a jurisdiction-stripping power. Congress can deprive the states of their power to act at all in a given area, regardless of whether State law actually conflicted with federal law.[21]

The Court's expansion of the preemption doctrine was accompanied by a vast expansion of the Commerce Clause during the

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[15] Adam D. Thierer, "The Delicate Balance: Federalism, Interstate Commerce, and Economic Freedom in the Technological Age", The Heritage Foundation (1999); Statement of Adam D. Thierer, Heritage Foundation, before the Senate Governmental Affairs Committee, May 5, 1999; Statement of Professor John S. Baker, Jr., Louisiana State University Law Center, before the Senate Governmental Affairs Committee, July 14, 1999.

[16] *New York* v. *United States*, 505 U.S. 144, 157 (1992).

[17] Advisory Commission on Intergovernmental Relations, "Regulatory Federalism: Policy, Process, Impact and Reform", 50 (1984).

[18] U.S. Const. art. VI (emphasis added).

[19] See Stephen A. Gardbaum, "The Nature of Preemption," 79 Cornell L. Rev. 767 (1994).

[20] See *Southern Railway Co.* v. *Reid*, 222 U.S. 424 (1912).

[21] See Stephen A. Gardbaum, supra note 19.

New Deal.[22] In combination, those two developments dramatically altered the balance of power between the Federal Government and the States and raised profound questions about the meaningfulness of federalism.[23] Only recently, a number of Supreme Court decisions have begun to right the balance.[24]

Since the ratification of the Constitution, the nature and extent of commerce have changed dramatically. Interstate economic activity has steadily expanded. Industrialization, coupled with advances in transportation and communications, has created a national economy in which virtually every activity occurring within the borders of a State can play a part. Recent technological advances such as the Internet have created a truly global economy.[25]

The Committee recognizes that there may be compelling reasons for Congress or agencies to exercise the power of preemption in particular cases. Indeed, the second finding in S. 1214 states that "preemptive statutes and regulations have at times been an appropriate exercise of Federal powers."[26] First and foremost, the Federal Government has a duty to protect the Constitutional rights of individuals. Civil rights is a clear example where federal preemption has been warranted. Preemption also may be necessary to solve problems that are national in scope, such as air pollution control.[27] In other contexts, state regulations that made sense at a time of primarily local markets may produce wasteful conflicts and duplication where national businesses are affected. Modern commercial realities may demand a cost-effective balance of federal and state regulation. While the Committee recognizes that preemption may be appropriate or even necessary, the Committee believes that decisions whether or not to preempt state and local authority should be made in a careful and open manner.

Federal preemptions of state and local authority mushroomed in the twentieth century. Only about 30 statutes were enacted between 1789 and 1899 had the effect of significantly preempting the

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[22] See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States* v. *Darby,* 312 U.S. 100 (1941).

[23] See Stephen A. Gardbaum, supra note 19, at 814–15. The impact of the preemption doctrine and the expanded interpretation of the Commerce Clause was dramatic, notwithstanding the Court's introduction of a presumption against preemption. Id. at 806.

[24] See *United States* v. *Lopez,* 514 U.S. 549 (1995) (Gun-Free School Zones Act, prohibiting possession of firearms in school zones, exceeded Commerce Clause); *New York* v. *United States,* 505 U.S. 144 (1992) (Federal Low-Level Radioactive Waste Policy Amendments Act violated 10th Amendment by commandeering states into legislating); *Printz* v. *United States,* 521 U.S. 898 (1997) (Brady Act provision requiring local law enforcement officers to conduct background checks on proposed handgun transfers, violated 10th Amendment by commandeering state officers to execute federal laws); *Seminole Tribe* v. *Florida,* 517 U.S. 44 (1996) (Congress lacked power under commerce clause to abrogate state's 11th Amendment immunity); *City of Boerne* v. *Flores,* 117 S. Ct. 2365 (1997) (striking down Religious Freedom Restoration Act under section 5 of 14th Amendment because Congress exceeded power by redefining 14th Amendment religious freedom guarantees); *Alden* v. *Maine,* 144 L.Ed.2d 636 (1999) (state probation officers could not sue state in state courts because Congress lacked power to subject nonconsenting states to private suits for damages); *Florida Pre-paid Postsecondary Education Expense Board* v. *College Savings Bank,* 142 L.Ed.2d 654 (1999) (neither companies nor individuals can sue nonconsenting states for patent infringement in violation of federal statute); *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board,* 144 L.Ed.2d 605 (1999) (neither companies nor individuals can sue nonconsenting states for false advertising in violation of federal statute).

[25] See Adam D. Thierer, "The Delicate Balance: Federalism, Interstate Commerce, and Economic Freedom in the Technological Age", The Heritage Foundation (1999).

[26] S. 1214, section 2(2).

[27] See Testimony of Professor William A. Galston, University of Maryland School of Public Affairs, before the Senate Governmental Affairs Committee, May 5, 1999; Testimony of Professor Rena Steinzor, University of Maryland School of Law before the Senate Governmental Affairs Committee, July 14, 1999, at 5.

powers of the States.[28] That trend began to shift at the turn of the century. Of the approximately 439 significant preemption statutes enacted by Congress in the 200 years since 1789, more than half were enacted since 1963.[29] Preemption has been at the center of many hard-fought legal battles on important economic and social issues.[30] From their initial limited scope, preemptions have come to span a wide range of commercial, monetary, civil rights, environmental, health, and safety fields.[31] The frequency and pace of Federal preemption has accelerated even more since the mid-1990s.[32] Preemption legislation recently has been considered or enacted in areas ranging from taxation of electronic commerce to telecommunications, health care, civil justice, international trade, electricity deregulation, financial services, and land use planning.[33] If this trend continues, state and local governments may find it increasingly difficult to play their traditional role.[34]

The increase in Federal preemption of state and local powers has been reflected in court dockets. Preemption is "almost certainly the most frequently used doctrine of constitutional law in practice."[35] According to one study, ten preemption cases, or two percent of the Court's docket, were heard during the Supreme Court's 1962, 1963 and 1964 terms combined. By its 1985, 1986 and 1987 terms, the Court heard 39 preemption cases, which represented nine percent of its docket.[36] A cursory review by the Congressional Research Service indicated that from January 1997 to August 1999, there were approximately 508 preemption opinions issued by the Federal courts and 600 by the state courts.

The expansion of the preemption power has played an integral role in the Federal Government's inroads on state power and has had important implications. The extent to which federal law displaces state law affects both the distribution of power between the States and the Federal Government and the substantive legal rules of our society.[37] Preemption can prohibit economic regulation and other activities by state and local governments, as well as require states to enforce federal laws, conform their own laws to federal standards, and take on new responsibilities.[38]

Preemption also can undermine democratic accountability. The Court's current preemption doctrine, particularly obstacle and field

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[28] U.S. Advisory Commission on Intergovernmental Relations, "Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues (Sept. 1992), at 6, Table 1–1.

[29] U.S. Advisory Commission on Intergovernmental Relations, supra note 28, at iii, 9, Table 1–1.

[30] See Kenneth Starr et. al., supra note 19, at 1–2.

[31] Id.; U.S. Advisory Commission on Intergovernmental Relations, "Regulatory Federalism: Policy, Process, Impact and Reform" (Feb. 1984).

[32] See William T. Waren, "Anything Left to Legislate About?," State Legislatures 23 (Sept. 1999); Carl Tubbesing, "The Dual Personality of Federalism," State Legislatures (Apr. 1998).

[33] Testimony of Governor Michael O. Leavitt, Vice Chairman, National Governors' Association, before the Senate Governmental Affairs Committee, May 5, 1999; Testimony of Governor Thomas R. Carper, Chairman, National Governors' Association, before the Senate Governmental Affairs Committee, July 14, 1999; William T. Waren, supra note 32; Carl Tubbesing, supra note 32.

[34] Testimony of Majority Leader Daniel T. Blue, Jr., President, National Conference of State Legislatures, before the Senate Committee on Governmental Affairs, May 5, 1999; William T. Waren, supra note 32; Carl Tubbesing, supra note 32.

[35] Stephen A. Gardbaum, supra note 19, at 768.

[36] Kenneth Starr, et al., supra note 19, at 1 and n.3.

[37] Testimony of Professor Caleb Nelson, University of Virginia School of Law, before the Senate Governmental Affairs Committee, July 14, 1999.

[38] U.S. Advisory Commission on Intergovernmental Relations, "Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues" (Sept. 1992).

preemption, effectively shifts power from elected state officials to the courts. By inferring a broad intent to preempt in situations where other plausible and less drastic interpretations of Congressional intent are available, the courts may unnecessarily strip the states of all power to act in a given area.[39]

According to some commentators, the courts often analyze preemption cases without focusing directly on the question whether Congress actually intended to preempt state law. The courts tend to focus on the effect of state law on the operation of the federal scheme rather than on the intent of Congress to displace state authority. Courts may state that they analyze congressional intent but then focus on the general purpose of the federal statute at issue instead of the specific intent to displace state law. In other words, Congressional "intent" often is inferred as though the States did not exist at all, and the state law is then placed in opposition to that intent.[40]

The lack of Congressional guidance in statutes has compounded the difficulties faced by state and local government. Congress often provides little direction regarding the intended scope of the preemptions it has enacted. Faced with vague statutory language, state and local government officials have been forced to confront substantial uncertainty or to engage in time-consuming, costly litigation.

The current preemption doctrine has been a source of considerable confusion and uncertainty.[41] The courts do not have clear rules for interpreting Congressional intent to preempt.[42] The courts have not followed a consistent and predictable doctrine in adjudicating these cases. They have not required an express statement of the intent to preempt state or local law, or a conflict between federal and state law, before inferring an intent to preempt.[43] "[T]he distinction between express (and actual conflict) preemption and implied preemption is important. By their very nature, implied preemption doctrines authorize courts to displace state law based on indirect and sometimes less than compelling evidence of legislative intent. This indirectness in turn suggests a greater potential for unpredictability and instability in the law."[44] Most troubling, it is highly questionable in some cases whether a preemptive intent in-

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[39] Stephen A. Gardbaum, supra note 19.

[40] Paul Wolfson, "Preemption and Federalism: The Missing Link," 16 Hastings Const. L.Q. 69, 98 (Fall 1988); Testimony of Professor Caleb Nelson, University of Virginia School of Law, before the Senate Governmental Affairs Committee, July 14, 1999.

[41] Testimony of Professor Caleb Nelson, University of Virginia School of Law, before the Senate Governmental Affairs Committee, July 14, 1999.

[42] See, e.g., *San Diego Building Trades Counsel* v. *Garmon*, 359 U.S. 236, (1959) (referring to "ascertaining the intent of Congress" as a "delusive phrase"); *Hines* v. *Davidowitz*, 312 U.S. 53, 67 (1941) ("In the final analysis, there can be no one crystal clear distinctly marked formula"); Testimony of Professor Caleb Nelson, University of Virginia School of Law, before the Senate Governmental Affairs Committee, July 14, 1999; Statement of Professor John S. Baker, Jr., Louisiana State University Law Center, before the Senate Governmental Affairs Committee, July 14, 1999; Roger Miner, "Preemptive Strikes on State Autonomy: The Role of Congress," Heritage Lecture Series (Feb. 18, 1987).

[43] Testimony of Professor Caleb Nelson, University of Virginia School of Law, before the Senate Governmental Affairs Committee, July 14, 1999; Stephen A. Gardbaum, supra note 19; Roger Miner, supra note 42.

[44] Kenneth Starr, et al., supra note 19, at 15.

ferred by the courts ever would have received the support of a majority in Congress had it been expressly stated.[45]

While Congress must take greater responsibility to respect principles of federalism, so too must the executive branch. As the modern administrative state has grown, the federal-state balance has been increasingly affected by the actions of the federal agencies that Congress created and entrusted with a wide variety of statutes.[46]

A dispute over the federalism policy of the executive branch in 1998 helped catalyze the development of S. 1214. Until recently, the federalism policy of the executive branch has been guided by Executive Order 12612, issued by President Ronald Reagan in 1987. Grounded in the Tenth Amendment, E.O. 12612 outlined a set of strong federalism policymaking criteria to dissuade agencies from interpreting federal statutes expansively and heedlessly preempting state law. The Order required agencies to appoint a federalism officer, to consult with state and local officials, and to prepare federalism assessments for rules with federalism impacts.

On May 14, 1998, President Clinton signed Executive Order 13083 on "Federalism." That Order proposed to repeal the longstanding Reagan order and replace it with a new set of policymaking criteria that raised concerns that it could have allowed, or even encouraged, federal bureaucracies to intervene in State and local affairs or preempt state and local law under a variety of circumstances.[47] While the order directed federal agencies to consult more with state and local officials, it was drafted without any consultation. State and local government organizations, upset with the substance of the order and the lack of consultation, expressed their concern to members of Congress. On July 22, Chairman Thompson introduced a resolution calling on the White House to revoke its order.[48] The Thompson resolution was supported by then-Governor George Voinovich, who chaired the National Governors' Association.[49] That same day, the Thompson resolution passed the Senate unanimously.[50] On July 28, Chairman David McIntosh of the House Government Reform and Oversight's Subcommittee on Regulatory Affairs convened a hearing on E.O. 13083. On August 5, shortly before the annual meeting of the National Governors' Association, the White House announced that it would suspend E.O. 13083 and would consult with State and local officials on a new order.[51]

Shortly after these events, representatives of the "Big 7"[52] state and local government organizations asked Chairman Thompson to work with them on comprehensive federalism legislation. The goal

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[45] Testimony of Professor Caleb Nelson, University of Virginia School of Law, before the Senate Governmental Affairs Committee, July 14, 1999.

[46] Kenneth Starr, et al., supra note 19, at 31.

[47] Letter from Big 7 to President Clinton, July 17, 1998, 144 Cong. Rec. S8747 (July 22, 1998).

[48] 144 Cong. Rec. S8747.

[49] Id. at S8748.

[50] 144 Cong. Rec. S8769.

[51] David S. Broder, "Clinton 'Suspends' Federalism Order to Assuage Local, State Officials," Washington Post, A5, August 2, 1998; "Executive Rules," Wall Street Journal, A14, August 6, 1998.

[52] The "Big 7" includes the National Governors' Association, the National Conference of State Legislatures, the National Association of Counties, The U.S. Conference of Mayors, the Council of State Governments, the National League of Cities, and the International City/County Management Association.

was enforceable legislation that would apply not only to the executive branch, but also to Congress and the judicial branch. Senators Thompson, Voinovich and Levin, as well as Congressmen David McIntosh, Jim Moran and five other House members, collaborated in drafting legislation. This effort led to the introduction of S. 1214 with broad bipartisan support on June 10, 1999. On June 16, the companion bill, H.R. 2245, was introduced in the House.

While the federalism legislation was being drafted, GAO completed an investigation requested by Chairman Thompson on agency non-compliance with the longstanding federalism order, E.O. 12612.[53] GAO found that for 11,414 rules issued between 1996 and 1998, the federal agencies prepared only 5 federalism assessments. For over 1,900 rules issued by the Environmental Protection Agency during that period, the agency never even mentioned E.O. 12612.[54]

On August 4, about a year after E.O. 13083 was suspended, the White House issued a new federalism order, E.O. 13132.[55] Representatives of the Big 7 stated that the new order was a substantial improvement over the proposed E.O. 13083. However, mindful of the stark record on noncompliance with federalism assessment requirements, the Committee believes that legislative action is warranted. Upon introduction of S. 1214, Chairman Thompson stated, "[i]t is time for legislation to ensure that the agencies take such requirements more seriously."[56] Senator Levin also stated, "as was amply demonstrated by a recent GAO report, Executive Order requirements for federalism assessments have been ignored. The bill would correct this noncompliance by the Executive Branch, and ensure that the independent agencies, as well, will engage in such consultation and publish assessments along with rules."[57]

The "Federalism Accountability Act" seeks to remedy the problems in Federal-State-local relations. The Act sets forth principles of federalism to guide the development of statutes and regulations. In addition, the Act establishes an analytical process for the Congress and federal agencies to assess the justification for and the acceptable scope of preemption and other federalism impacts according to these principles. Finally, the Act seeks to provide guidance to the courts and federal agencies in determining Congressional and agency intent regarding preemption.

The procedures in the Federalism Accountability Act are intended to ensure that state and local government are accorded their due respect in our federal system of government. The legisla-

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[53] See Statement of L. Nye Stevens, Director, Federal Management and Workforce Issues, General Government Division, GAO, before the Senate Governmental Affairs Committee, "Federalism: Implementation of Executive Order 12612 in the Rulemaking Process", GAO/T–GGD–99–93, May 5, 1999.

[54] OMB officials raised some concerns about GAO's findings. In a letter to GAO, the Acting OIRA Administrator stated that the critical issue was how well the federal agencies consulted with state and local officials. Letter from Don Arbuckle, Acting Administrator of OIRA to Nye Stevens, Director of Federal Management and Workforce Issues, GAO (May 4, 1999). However, following that letter, Senator Levin asked GAO to determine how many of the major rules issued between April 1996 and December 1998 involved consultation. GAO reported that of the 117 major rules issued during that period, 96 of those rules did not mention any intergovernmental consultation, even though 32 of those 96 rules had a federalism impact, and 15 of the 32 rules also preempted state law. See Opening Statement of Senator Carl Levin, Hearing on S. 1214, the Federalism Accountability Act (July 14, 1999).

[55] 64 Fed. Reg. 43255 (Aug. 10, 1999).

[56] Statement of Chairman Fred Thompson, 145 Cong. Rec. S6872 (June 10, 1999).

[57] Statement of Senator Carl Levin, 145 Cong. Rec. S6874 (June 10, 1999).

tion pushes federalism to the fore, where procedurally it would be more difficult to ignore.[58] By requiring Congress and the federal agencies to consider the federal implications of their proposed actions, the legislation would foster better communication between elected officials at the federal, state and local levels. The legislation also is intended to clarify and rationalize the preemption doctrine. Finally, the legislation would impose political accountability for decisions that significantly impact federalism. As one authority put it, "[p]ower and responsibility should go together, like pepper and salt. Because Congress has the ultimate power to decide preemption cases—Congress after all can always overrule the Court on this question—Congress ought to exercise this power unambiguously and shoulder the ultimate responsibility as well." [59]

III. Legislative History and Committee Consideration

A. COMMITTEE HEARINGS

On May 5, 1999, the Governmental Affairs Committee held a hearing on the State of Federalism, which included discussion of the draft bill later introduced as the Federalism Accountability Act. Testifying at this hearing were: The Honorable Michael O. Leavitt, Governor of Utah and Vice-Chair of the National Governors' Association; The Honorable Tommy Thompson, Governor of Wisconsin and President of the Council of State Governments; The Honorable Clarence E. Anthony, Mayor of the City of South Bay, Florida and President of the National League of Cities; The Honorable Daniel T. Blue, Jr., Senior Democratic Leader of the North Carolina House of Representatives and President of the National Conference of State Legislatures; Professor John O. McGinnis, Cardozo Law School; and Professor William A. Galston, University of Maryland School of Public Affairs. Adam D. Thierer of the Heritage Foundation, and L. Nye Stevens, Director of Federal Management and Workforce Issues, GAO,[60] submitted statements for the record.

On July 14, the Committee held a second hearing that solely addressed the Federalism Accountability Act. Testifying at this hearing were: The Honorable John Spotila, Administrator, Office of Information and Regulatory Affairs, OMB; Mr. Randy Moss, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice; The Honorable Thomas Carper, Governor of Delaware and Chairman of the National Governors' Association; The Honorable John Dorso, Majority Leader, North Dakota House of Representatives, on behalf of the National Conference of State Legislatures; The Honorable Alexander G. Fekete, Mayor of Pembroke Pines, Florida, on behalf of the National League of Cities; Professor Caleb Nelson, University of Virginia School of Law; Professor Ernest Gellhorn, George Mason University School of Law; and Professor Rena Steinzor, University of Maryland School of Law. Professor

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[58] Statement of Professor John S. Baker, Jr., Louisiana State University Law Center, before the Senate Governmental Affairs Committee, July 14, 1999.

[59] Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law, "Federal Regulation and State Authority," § 12.4 (1992), at 91.

[60] Statement of L. Nye Stevens, Director, Federal Management and Workforce Issues, General Government Division, GAO, before the Senate Governmental Affairs Committee, "Federalism: Implementation of Executive Order 12612 in the Rulemaking Process," GAO/T–GGD–99–93, May 5, 1999.

John D. Baker, Louisiana State University Law Center, submitted a statement for the record.

B. AMENDMENTS AND COMMITTEE ACTION

On August 3, 1999, the Committee on Governmental Affairs marked up and favorably reported S. 1214 by a vote of 8 to 2. Voting in the affirmative were Senators Stevens, Collins, Voinovich, Lieberman, Levin, Akaka, Edwards and Thompson. Voting in the negative were Senators Durbin and Cleland. In addition, Senators Roth, Domenici, Cochran, and Gregg voted in the affirmative by proxy.

Several amendments were offered, debated and voted upon. The following amendments were adopted:

(1) Senator Thompson offered an amendment to establish standing requirements, limited judicial review, and an emergency exemption for the federalism assessment requirement, as amended by Senator Levin's second degree amendment (adopted by voice vote).

(2) Senator Thompson offered an amendment to section 8 of the bill to clarify that performance measures for State-administered grant programs are to be determined in consultation with public officials, as amended by Senator Levin's second degree amendment (adopted by voice vote).

(3) Senator Lieberman offered an amendment to strike from the bill subsection 6(c) (adopted by voice vote).

The following amendment was defeated: Senator Durbin offered an amendment to modify the Employee Retirement Income Security Act of 1974 ("ERISA") to state that nothing in ERISA shall be construed to preempt state law providing a cause of action or a remedy relating to benefit claims processing for a benefit under an employee welfare plan. The amendment was defeated by a vote of 6–10. Voting in the affirmative were Senators Specter (by proxy), Akaka, Durbin, Torricelli (by proxy), Cleland, and Edwards. Voting in the negative were Senators Roth (by proxy), Stevens, Collins, Voinovich, Domenici (by proxy), Cochran (by proxy), Gregg (by proxy), Lieberman, Levin, and Thompson.

IV. ADMINISTRATION VIEWS

At the Committee's July 14 hearing on S. 1214, two witnesses testified for the Administration: The Honorable John Spotila, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, and Mr. Randy Moss, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice. Mr. Spotila expressed concern about the impact of judicial review on the federalism assessment requirements in section 7 of the bill. Mr. Moss expressed concern about the rule of construction in section 6, particularly subsection 6(c). The Administration also expressed the desire to work with the Committee to address these concerns.

V. SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

The name of this legislation is the "Federalism Accountability Act of 1999".

SECTION 2. FINDINGS

Section 2 lays out six basic findings by the Committee. These findings underscore both the strengths and problems with our federal system of government. These findings are as follows:

First, the Constitution created a strong federal system, reserving to the States all powers not delegated to the Federal Government.

Second, preemptive statutes and regulations have at times been an appropriate exercise of federal powers, and at other times, have been an inappropriate infringement on state and local government authority.

Third, on numerous occasions, Congress has enacted statutes and the agencies have promulgated rules that explicitly preempt state and local government authority and describe the scope of the preemption.

Fourth, in addition to statutes and rules that explicitly preempt State and local government authority, many other statutes and rules that lack an explicit statement by Congress or the agencies of their intent to preempt and a clear description of the scope of the preemption have been construed to preempt state and local government authority.

Fifth, in the past, the lack of clear congressional intent regarding preemption has resulted in too much discretion for federal agencies and uncertainty for state and local governments, leaving the presence or scope of preemption to be litigated and determined by the judiciary and sometimes producing results contrary to or beyond the intent of Congress.

Sixth, state and local governments are full partners in all federal programs administered by those governments.

SECTION 3. PURPOSES

Section 3 lays out four basic purposes of the Federalism Accountability Act:

First, to promote and preserve the integrity and effectiveness of our federal system of government;

Second, to set forth principles governing the interpretation of congressional and agency intent regarding preemption of state and local government authority by federal laws and rules;

Third, to establish an information collection system designed to monitor the incidence of federal statutory, regulatory, and judicial preemption; and

Fourth, to recognize the partnership between the Federal Government and state and local governments in the implementation of certain federal programs.

SECTION. 4. DEFINITIONS

This section defines certain terms used in the Federalism Accountability Act.

(1) The term "local government" means a county, city, town, borough, township, village, school district, special district, or other political subdivision of a State;

(2) The term "public officials" means elected state and local government officials and their representative organizations;

(3) The term "State" (A) means a State of the United States and an agency or instrumentality of a State; (B) includes the District of Columbia and any territory of the United States, and an agency or instrumentality of the District of Columbia or such territory; (C) includes any tribal government and an agency or instrumentality of such government; and (D) does not include a local government of a State.

(4) The term "tribal government" means an Indian tribe as that term is defined under section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)).

In addition to the specific definitions provided in S. 1214, the definitions under section 551 of title 5, United States Code, apply.

SECTION 5. COMMITTEE OR CONFERENCE REPORTS

Section 5 requires each Congressional committee report or conference report to include a statement on whether bills or joint resolutions of a public character are intended to preempt state or local law, and if so, to provide an explanation of the reasons for preemption. In the absence of a committee or conference report, the committee or conference shall report to the Senate and the House of Representatives a statement containing the information described in this section before consideration of the bill, joint resolution, or conference report.

The statement shall include an analysis of: (1) the extent to which the bill or joint resolution legislates in an area of traditional State authority; and (2) the extent to which state or local government authority will be maintained if the bill or joint resolution is enacted by Congress.

SECTION 6. RULE OF CONSTRUCTION RELATING TO PREEMPTION

Section 6 establishes a rule of construction to guide courts and agencies in interpreting whether statutes or rules are intended to preempt State or local law.

Subsection 6(a) provides that no statute enacted after the effective date of the Federalism Accountability Act shall be construed to preempt, in whole or in part, state or local government laws, ordinances, or regulations, unless the statute explicitly states that preemption is intended, or there is a direct conflict between such statute and a state or local law so that the two cannot be reconciled or consistently stand together.

Subsection 6(b) provides that no rule promulgated after the effective date of the Federalism Accountability Act shall be construed to preempt, in whole or in part, state or local government laws unless preemption is authorized by the statute under which the rule is promulgated and the agency, in compliance with section 7, explicitly states that such preemption is intended; or there is a direct conflict between such rule and a state or local law so that the two cannot be reconciled or consistently stand together.

Section 6 establishes a rule of construction for the federal courts and agencies in carrying out their reviewing function when it is necessary for them to determine whether or not Congress or the agencies, in enacting a particular statute or promulgating a rule, intended to displace or strike down state or local law. This accords with the Supremacy Clause of the Constitution. The rule of construction affords no new power either to the Congress or to the States. This rule of construction would not impair the Supremacy Clause. To the contrary, section 6 requires courts and reviewing agencies to interpret federal statutes and rules in conformity with the Supremacy Clause.[61] The Supremacy Clause itself does not foreclose states from legislating in a field of concurrent jurisdiction. The rule of construction merely directs the courts and agencies not to infer or presume an intent by Congress or the agencies to preempt or preclude states or localities from legislating in a concurrent field unless, by an express provision, they have stated their intent to preempt, or unless there is a direct conflict[62] between the federal law and the state or local law so that the two cannot be reconciled or consistently stand together.

It has long been recognized that Congress may pass rules of construction governing the interpretation of subsequent statutes.[63] Corpus Juris Secundum states:

> A statute governing the construction of statutes will be given effect. Since it is competent for the legislature to provide rules for the construction of statutes, a statute governing the construction of statutes will be given effect. These provisions may be for the construction of statutes already in existence, or for those which may be enacted in the future; and after the passage of such provisions succeeding legislatures should frame enactments with reference thereto, but these provisions are not, and cannot be, an attempt to hinder future legislatures in enacting new laws. The statutory rules of construction may be declaratory of the common law, or they may be intended to furnish additional rules for the guidance of the court when necessary.[64]

Similarly, Sutherland on Statutory Construction states:

> The usual purpose of a special interpretative statute is to correct a judicial interpretation of a prior law which the legislature determines to be inaccurate. Where such statutes are given any effect, the effect is prospective only. Any other result would make the legislature a court of last resort. But the corollary so frequently asserted by the courts that a legislature cannot with binding effect inter-

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[61] See discussion, supra, Section II.

[62] *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat) 1 (1824), is the paradigmatic preemption case involving an actual conflict between state and federal law. Such a conflict exists where the conflict can be either substantive or jurisdictional. See Caleb Nelson, "Preemption," l Va. L. Rev. l (forthcoming 2000). In such cases, preemption analysis requires a straightforward application of the Supremacy Clause.

[63] See The Dictionary Act, 1 U.S.C. § 1 et seq. (1985).

[64] 82 C.J.S. Statutory Rules and Provisions § 314 (Supp. 1999), at 534 (citations omitted); see also, *Stockdale* v. *Insurance Companies*, 87 U.S. 323, 332 (1847) (refusing to "captiously to construe the use of the word 'construe' as a revision of the judicial functions where the effect of the statute and the purpose of the statute are clearly within the legislative function") .

> pret or define its own terms in a subsequent and independent statute is unfounded. The application of the law to particular situations in litigation is clearly a judicial function, but the definition of the meaning of the legislature's own acts is essential to the determination of the quality and character of the legislative regulation. There should be no question but that an interpretative clause operating prospectively is within legislative power. Any other result would emasculate legislative authority and in effect counter an unreviewable legislative power on the court.[65]

Under its terms, S. 1214 would not invalidate any existing federal statute, nor would it limit the jurisdiction and judicial function of any court. It would not apply in a field which the Constitution delegates to Congress the exclusive power to legislate.

Section 6 addresses the circumstances under which State and local law is preempted. Nothing in section 6 requires or authorizes the invalidation or narrow construction of a federal minimum standard or of a federal agency's authority to adopt a standard. Section 6 does not, for example, limit the stringency or scope of federal statutes or regulations that establish minimum standards, such as those protecting public health or safety or the environment. Nor does section 6 limit the authority of a federal agency to promulgate such standards.

The requirement in subsection (b) that an agency preemption be authorized by the statute restates current law that agencies cannot exercise the power of preemption unless they have the authority to do so. In requiring that preemption "be authorized by the statute under which the rule is promulgated," subsection (b)(1)(A) does not limit the kind of statutory authority that an agency must have for its regulation to preempt state or local law. Subsection (b)(1)(A) merely requires that an agency's explicit statement of preemptive intent will be deemed effective under subsection (b)(1)(B) only if the agency adopted the preemption under some valid statutory authority.[66]

S. 1214, in effect, would say to the reviewing court or agency that where Congress and the States share concurrent powers, if an act of Congress does not contain an express preemption provision, there should be no presumption of an intent to preempt the field, and the state law should not be struck down, unless the two laws—federal and state—cannot consistently stand together. On the other hand, if Congress in a federal statute, or a federal agency in a rule, has stated an intent to preempt through an express preemption provision, the federal law shall prevail so long as the Congress or the agency has the authority to preempt.

The effect of the Act, then, is to guide the court in understanding legislative intent which is not stated in an express preemption clause and which would invalidate a state statute, unless the court finds that the legislation causes a direct conflict between the two acts so that the two cannot stand together.

The Committee believes that S. 1214 recognizes the fundamental principle that the United States is a nation in which sovereign

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[65] Sutherland Stat Const § 27.03 (5th Ed. 1994) (citations omitted).
[66] See *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988).

power is divided between the States and the Federal Government. If decisions are to be made to deprive the States of their authority, these decisions should be made by the democratic branches of the Federal Government. Because Congressional intent is the touchstone of preemption analysis, Congress has a responsibility to guide reviewing courts and agencies in interpreting its intent.

SECTION 7. AGENCY FEDERALISM ASSESSMENTS

This section lays out the requirements for agencies to consult with public officials and to prepare federalism assessments for rules that have federalism impacts. The Committee believes that the longstanding requirement for agencies to prepare federalism assessments, coupled with an exceptionally poor record of agency compliance with those requirements,[67] justifies codifying basic requirements for consultation and preparation of federalism assessments. The Committee also believes that greater openness and communication between the federal agencies and state and local officials will promote democratic self-governance. The administration and enforcement of federal laws and regulations are largely in the hands of unelected staff and career civil servants. These employees may have little knowledge or concern for the states and localities that may be affected by the federal statutes or regulations for which they are responsible. They are unlikely to be as responsive to the affected communities as the state and local officials who were elected to serve them.[68] The consultation and federalism assessments requirements in section 7 should help address these problems.

Subsection 7(a) provides that the head of each agency shall be personally responsible for implementing the Federalism Accountability Act. The agency head shall designate a federalism officer within the agency to manage the implementation of the Act and to serve as a liaison to state and local officials and their designated representatives.

Subsection 7(b) establishes procedures for notice and consultation with potentially affected state and local governments. Early in the process of developing a rule and before the publication of a notice of proposed rulemaking, the agency shall notify, consult with, and provide an opportunity for meaningful participation by public officials of governments that may potentially be affected by the rule for the purpose of identifying any preemption of state or local government authority or other significant federalism impacts that may result from issuance of the rule. If no notice of proposed rulemaking is published, consultation shall occur sufficiently in advance of publication of an interim final rule or final rule to provide an opportunity for meaningful participation.

Subsection 7(c) establishes requirements for agency federalism assessments. In addition to whatever other actions the federalism officer may take to manage the implementation of the Act, such officer shall identify each proposed, interim final, and final rule hav-

[67] Statement of L. Nye Stevens, Director, Federal Management and Workforce Issues, General Government Division, GAO, before the Senate Governmental Affairs Committee, "Federalism: Implementation of Executive Order 12612 in the Rulemaking Process", GAO/T–GGD–99–93, May 5, 1999.

[68] See *Garcia*, supra note 3, at 576 (Powell, J., Rehnquist, C.J., and O'Connor, J., dissenting).

ing a federalism impact, including each rule with a federalism impact identified under subsection 7(b), that warrants the preparation of a federalism assessment. With respect to each such rule identified by the federalism officer, a federalism assessment, as described in subsection 7(d), shall be prepared and published in the Federal Register at the time the proposed, interim final, and final rule is published. The agency head shall consider the federalism assessment in all decisions involved in promulgating, implementing, and interpreting the rule. Each federalism assessment shall be included in any submission made to the Office of Management and Budget by an agency for review of a rule.

Subsection 7(d) sets forth the requirements for contents of federalism assessments. Each federalism assessment shall include—(1) a statement on the extent to which the rule preempts state or local government law, ordinance, or regulation and, if so, an explanation of the reasons for such preemption; (2) an analysis of the extent to which the rule regulates in an area of traditional state authority; and the extent to which state or local authority will be maintained if the rule takes effect; (3) a description of the significant impacts of the rule on state and local governments; (4) any measures taken by the agency, including the consideration of regulatory alternatives, to minimize the impact on state and local governments; and (5) the extent of the agency's prior consultation with public officials, the nature of their concerns, and the extent to which those concerns have been met.

Subsection 7(e) provides publication and disclosure requirements for federalism assessments. For any applicable rule, the agency shall include a summary of the federalism assessment prepared under this section in a separately identified part of the statement of basis and purpose for the rule as it is to be published in the Federal Register. The summary shall include a list of the public officials consulted and briefly describe the views of such officials and the agency's response to such views.

The requirements of section 7 are procedural only—notice and consultation and the preparation, consideration, and publication of federalism assessments. The requirements of section 7 do not override or supersede an agency's substantive authority or scope of discretion. In other words, section 7 does not contain a "supermandate." It does not override the range of regulatory options, including options that could preempt state law, that are lawfully available to the agency.

Subsection 7(f) establishes the framework for judicial review of agency compliance with the federalism assessment requirements of this legislation. First, subsection 7(f)(1) provides that only a state or local government that is adversely affected or aggrieved by final agency action, or its representative organization, may sue to seek judicial review of compliance with section 7.

Second, subsection 7(f) sets the standard for judicial review. Subsection 7(f) is addressed solely to judicial review of "[c]ompliance by an agency with this section." To the extent that an agency action is being challenged on grounds other than alleged noncompliance with the provisions of section 7, subsection 7(f) would not apply.

Subsection (f)(2) sets three basic conditions for judicial review of agency compliance with the provisions of Subchapter II: The judi-

cial review must occur—(1) in connection with review of final agency action; (2) in accordance with subsection 7(f); and (3) in accordance with the limitations on timing, venue, and scope of review imposed by the statute authorizing the review. In setting forth the third condition, the Committee recognizes that in some cases, the statute authorizing review may not impose any special limitations on timing, venue, or scope of review; in other cases, these matters may be addressed in several different statutes.

Subsection (f)(3) governs the availability and standard of review of agency determinations whether a federalism assessment is required to be prepared. An agency's determination of whether a rule has a federalism impact and thus is subject to the requirements of section 7—is subject to review only in connection with review of the final agency action to which it applies. At that time, a court may set aside the agency's determination of whether a federalism assessment is required only if it is shown to be arbitrary or capricious.

In close cases, the Committee would expect that the agency would err on the side of good analysis and avoid the risk of remand or invalidation of the rule. As a practical matter, the agency's determination will be consequential where the agency wrongly determines that a federalism assessment is not required and does not bother to perform one or to consult with public officials. In such a case, subsection (f)(6) would require the court to remand or invalidate the rule, unless the court found that such failure to perform the assessment was not prejudicial.

By contrast, if the agency incorrectly determines that a rule has federalism impacts, the impact on the rule itself is not likely to be adverse—since a rule would not be remanded or invalidated just because an agency performed a federalism assessment and consulted with public officials. After all, the Executive Branch is free to undertake such actions today even where it is not required to do so by statute. Indeed, that is the premise of executive orders on federalism that date back to the Reagan Administration's Executive Order 12612, and that is currently embodied in Executive Order 13132.

Under subsection (f)(4), a designation by the Director of OMB that a federalism assessment shall be prepared—or the failure to make such a designation—is not subject to judicial review. If the Director has determined a rule has federalism impacts, the requirements of section 7 must be met. Conversely, if neither the Director nor the agency determines that a rule does not have federalism impacts, then the requirements of section 7 would not apply.

Subsection (f)(5) provides that any federalism assessment required under section 7 for a rule shall not be subject to judicial review separate from review of the final rule to which the assessment applies. Such a federalism assessment, however, would be part of the rulemaking record, and if the final rule to which it applies is brought before a court for review, the court would have to consider the assessment—to the extent relevant—in determining whether the final rule is arbitrary, capricious, an abuse of discretion, or un-

supported by substantial evidence.[69] Subsection (f)(6) states that if an agency fails to perform the federalism assessment, or to provide for consultation as required under section 7, the court "may, giving due regard to prejudicial error, remand or invalidate the rule." The adequacy of compliance with the specific requirements of the subchapter shall not otherwise be grounds for remanding or invalidating a rule under section 7. If the court allows the rule to take effect, the court shall order the agency to promptly perform such assessment and to provide for consultation. If an agency fails to perform the federalism assessment, or consultation, the court may, with due regard to the principle of prejudicial error, invalidate or remand the rule. In this respect, S. 1214 expands the role of a reviewing court by directing that a rule may be invalidated in circumstances where it might not be invalidated under current law.

Under section 7, an agency's failure to comply with a specific requirement of S. 1214 regarding how to perform a federalism assessment would not, in and of itself, be grounds for invalidating a rule. That is, a rule could not be invalidated simply because a "how to" requirement of section 7 was not met where the relevant statute does not impose such a requirement. At the same time, however, in determining whether the final rule is arbitrary or capricious, the court would be free to consider the effect that the agency's failure to comply with such requirements had on the rulemaking. In addition, of course, the information generated under section 7 would be available to the court and could be considered in determining whether the final rule is arbitrary or capricious. In sum, in determining whether a rule is arbitrary or capricious, a court would remain free under S. 1214—as it is under current law—to consider both what the agency did do, as reflected in the federalism assessment, and what it did not do, such as failing to comply with the requirements of section 7.

Subsection 7(g)(1) provides a limited exemption from compliance with the requirements of section 7 prior to issuance of the rule where: (1) the agency for good cause finds that conducting the federalism assessment under this section before the rule becomes effective is impracticable or contrary to an important public interest; and (2) the agency publishes the rule in the Federal Register with such finding and a succinct explanation of the reasons for the finding.

The Committee merely intends to provide sufficient flexibility for agencies to respond to a true emergency when a rule must be promulgated without awaiting completion of the assessment. This exemption closely tracks a category of rules exempt from the notice and comment procedures of the Administrative Procedure Act, and the Committee does not expect this exemption to be used often.

Subsection (g)(2) requires that, if a rule is adopted under paragraph (1) without prior compliance with section 7, then the agency shall comply with this section as promptly as possible, unless the

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[69] The "substantial evidence" standard would apply in those cases where a "substantial evidence" standard of review is provided by the enabling statute—such as under the Occupational Safety and Health Act, 29 U.S.C. §655(f), or the Toxic Substances Control Act, 15 U.S.C. §2618(c)—or where it is required by the Administrative Procedure Act, 5 U.S.C. §706(2)(E).

The phrase "under the statute granting the rule making authority" clarifies that a rule should not be set aside where the action alleged to be arbitrary, capricious, or an abuse of discretion involves a matter that cannot be relevant to promulgating the rule.

Director of the Office of Management and Budget determines that compliance would be clearly unreasonable. This is a very narrow exception to avoid clearly unreasonable situations where a costly assessment would be required for a rule that would not be in effect when the assessment was completed.

SECTION 8. PERFORMANCE MEASURES

Section 8 amends the Government Performance and Results Act of 1993 to ensure that performance measures for state-administered grant programs are determined in consultation with public officials.

SECTION 9. CONGRESSIONAL BUDGET OFFICE PREEMPTION REPORT

Section 9 requires the Congressional Budget Office to submit to Congress a biennial report on preemption that covers significant preemptions by agency rules, court decisions and legislation.

Subsection 9(a) requires OMB annually to submit to CBO information describing interim final rules and final rules issued during the preceding calendar year that significantly preempt State or local government authority. Subsection 9(b) requires the Congressional Research Service annually to submit to CBO information describing court decisions issued during the preceding calendar year that preempt state or local government authority.

Subsection 9(c) requires CBO, after each session of Congress, to prepare a report on the extent of significant federal preemption of State or local government authority enacted into law or adopted through judicial or agency interpretation of federal statutes during the previous session of Congress. The report shall contain: (1) a list of federal statutes preempting State or local government authority; (2) a summary of legislation reported from committees preempting State or local government authority; (3) a summary of rules of agencies preempting State and local government authority; and (4) a summary of court decisions finding preemption. CBO shall send the report to each committee of Congress; each Governor; the presiding officer of each chamber of the legislature of each state; and make the report available to other public officials and the public on the Internet.

While the CBO is designated to compile the report, the Committee expects that CRS and OMB will coordinate closely with CBO to prepare the required information. The Committee intends that OMB and CRS will be responsible for identifying regulatory and judicial preemptions, and for organizing, summarizing and ensuring the accuracy and reliability of that information before providing it to CBO in a format that CBO easily can incorporate into the annual report. CBO's primary duty will be to review and ensure the accuracy and reliability of that information and forward it to the Congress, along with information about legislative preemptions. If CBO determines that more thorough, accurate or reliable information is needed, the Committee expects OMB and CRS to cooperate closely with CBO in supplying that information.

SECTION 10. FLEXIBILITY AND FEDERAL INTERGOVERNMENTAL MANDATES

Section 10 addresses a misinterpretation of the Unfunded Mandates Reform Act of 1995 as it applies to large entitlement programs. Subsection 10(a) amends section 421(5) of the Budget Act, which defines what constitutes an intergovernmental mandate. For entitlement programs that provide more than $500 million annually to the states ("state entitlement programs"), section 421(5)(B) provides that legislation proposing a new restriction in these programs or a reduction in spending for these programs is a mandate unless there is sufficient flexibility to implement the restriction or funding reduction. The amendment proposed by subsection 10(a) modifies this definition to provide that legislation which proposes any new restriction will be an "intergovernmental mandate" regardless of whether or not there is flexibility to implement the change. Of course whether or not a point of order would lie against the legislation depends upon whether or not the cost (if any) exceeds the thresholds set out in the Unfunded Mandates Reform Act ($50 million/year).

Sections 10(b) and (c) amend sections 423(d) and 424(a), respectively, of the Budget Act with respect to reporting requirements imposed upon Congressional committees and the Congressional Budget Office (CBO) by the Unfunded Mandates Reform Act.

Currently, section 423(d) of the Budget Act requires Congressional committees to include information in the committee's report accompanying legislation which proposes reducing funding for state entitlement programs. The amendment proposed by section 10(b) adds a new requirement that the committee reports explain how the committee intends the states to implement the reduction in funding and what flexibility, if any, is provided in the legislation.

Section 424 of the Budget Act requires CBO to prepare mandates statements for legislation reported from committee. The amendment proposed by section 10(c) would add a new requirement for mandates statements in connection with legislation which proposes to reduce federal funding for state entitlement programs. If such legislation provides no additional flexibility to the states to implement the reduced funding, CBO must include in its report how the states could implement the reductions under existing law. If such legislation does provide additional flexibility, then CBO must include in its report an estimate of whether the savings from the additional flexibility would offset the reduction in federal spending. Such estimates shall assume that the states fully implement the additional flexibility provided in the legislation.

SECTION 11. EFFECTIVE DATE

The Federalism Accountability Act and the amendments made by it shall take effect 90 days after the date of enactment of the Act.

VI. Regulatory Impact Statement

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that S. 1214 will have a significant regulatory impact.

VII. CBO COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 27, 1999.

Hon. FRED THOMPSON,
Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1214, the Federalism Accountability Act of 1999.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are John R. Righter and Mary Maginniss.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

S. 1214—Federalism Accountability Act of 1999

S. 1214 would require Congressional committees and federal agencies to report on the extent that legislation, administrative rules, and federal court decisions preempt state or local authority. The bill also would require federal agencies to consult with state and local officials prior to issuing administrative rules that could preempt their authority. S. 1214 would allow the courts to review assessments performed by federal agencies as part of their review of agency rulemaking records. In addition, the bill would place additional reporting requirements on Congressional committees, CBO, and the Congressional Research Service (CRS). Subject to the availability of appropriated fund, CBO estimates that implementing the legislation would cost up to $500,000 each year.

For executive branch agencies, the provisions in S. 1214 are very similar to provisions contained in Executive Order 13132, which President Clinton signed on August 4, 1999, and in the Unfunded Mandates Reform Act (UMRA). For instance, the executive order requires executive branch agencies to consult extensively with state and local officials on rules or other actions that could encroach on state and local authorities. In addition, the order also requires agencies to issue federalism assessments for certain rule, although S. 1214 would require some additional information and would apply to more rules. (The executive order limits the assessments to rules or other actions that have "substantial direct effects" on state or local governments.) UMRA requires that agencies consult with state and local officials and, for any major rule (that is, a rule with expected annual costs to state and local governments of $100 million or more), issue a statement assessing the rule's impact on state and local governments. Because much of S. 1214 would codify existing consultative and analytical requirements, CBO estimates that implementing these provisions would cost executive branch agencies less than $250,000 a year, subject to available amounts.

Under S. 1214, a committee would be required to include a statement in its report on whether the legislation preempts state or local laws. The Office of Management and Budget and CRS would

be required to identify, compile, and summarize preemptions in agency rulemaking and judicial decisions, respectively, that occurred during the year. CBO would include this information in an annual report, along with a summary of statutes enacted and legislation reported from committees that preempted state or local government authority. In addition, the bill would direct CBO to include in its cost estimates information about states' flexibility in complying with certain legislative mandates in large entitlement programs. CBO estimates that implementing the bill would cost legislative branch agencies less than $250,000 annually, subject to the availability of appropriated funds.

Because enacting S. 1214 could affect direct spending by agencies not funded through annual appropriations, such as the Office of Thrift Supervision and the Tennessee Valley Authority, pay-as-you-go procedures would apply. CBO estimates that any such effects would not be significant. S. 1214 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on the budgets of state, local, or tribal governments.

The CBO staff contacts are John R. Righter and Mary Maginniss. This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

VIII. MINORITY VIEWS

S. 1214 would require Congress and agencies to issue an explicit "intent to preempt" statement and explanation of the reasons whenever laws or rules preempt state or local law. I note that the bill does not create a new point of order or other procedural mechanism to enforce the legislative aspect of this requirement. Agency compliance, on the other hand, would appear to be governed by the obligation to prepare federalism assessments where appropriate, and the availability of judicial review as a check on adherence to that mandate.

S. 1214 also establishes a new "rule of construction" such that courts shall not construe a Federal statute as preempting a State or local law unless (1) Congress is clear and explicit about the intent to preempt or (2) the Federal law is in direct conflict with the State or local law. Additionally, the bill requires agencies early on to notify and consult state and local officials who could potentially be affected by a rule.

S. 1214 recognizes that at times Congress enacts laws which preempt State laws without a full review of the scope of preemption or without deliberation of the traditional role of the States in a given area.

One of the most frequently cited statutes illustrative of overly broad Federal preemption is the Employment Retirement Income Security Act of 1974 (ERISA). ERISA is the proverbial poster child for preemption run amok. Throughout the debate prior to enactment, the debate on ERISA focused on pension security. The intent of ERISA was to protect worker's retirement income and to provide strong, uniform solvency standards. At the conclusion of the debate, health benefits were included under this uniform federal structure.

At that time, managed care as a health care delivery system had not yet emerged. In 1974, health insurance was entirely administered through a fee-for-service system. Therefore, health benefits were provided based on medical necessity with payment after the fact. Under such a system, the areas of dispute between a health insurance company and a patient are limited to denial of payment, which the remedies under ERISA addressed. However, under the current managed care delivery system, the actual provision of health care may be based on medical determinations by the insurer. ERISA is not well equipped to address disputes arising from such determinations which may profoundly affect an individual's health and well-being.

It is clear from reading the legislative history of ERISA that Congress never intended to preempt individual's rights to access state courts for remedies arising from negligence, medical malpractice, or other tort actions. The entire legislative history of ERISA, including committee hearings, is silent on this. In recog-

nizing the role the States play in regulating insurance including health insurance, the preemption language specifically exempts insurance from preemption. However, the remaining preemption language is extremely broad, covering anything that "relates to an employee benefit." Congress has inadvertently removed individual's States rights and remedies when injured by a health plan covered by ERISA. In many cases, courts have called on Congress to amend this preemption language to mirror congressional intent to provide worker protections.

During markup, I offered an amendment designed to clarify this ERISA preemption language so that it no longer denies injured parties access to their rights and remedies under State law. It would not create any new cause of action, but merely clarify that ERISA does not deny individuals their State-based rights and remedies. I hope we will have further opportunities to consider this, in light of the interest in addressing practical implications of Federalism principles as S. 1214 aims to do.

In their testimony at the July 14 committee hearing on this bill, both the Office of Management and Budget and the Justice Department raised specific concerns about S. 1214. OMB contended that new administrative requirements on agencies would burden and delay efforts to protect safety, health, and the environment, potentially necessitate litigation and require judicial review of collegial informal discussions, and divert resources and time from other tasks, including paperwork reduction initiatives, review and revision of obsolete rules, and conversion of rules into plain language.

The Justice Department emphasized the concern that the "rule of construction" provision, notably Section 6(a), would "profoundly alter the Federal courts' longstanding approach to preemption by Federal statute" and "would apparently abolish the doctrine of field preemption and impose significant new limits on conflict preemption." The Justice Department noted that enacting this bill would not prevent a later Congress from instructing that the preemptive effects of particular statute be determined by reference to traditional implied preemption doctrines, and that this could precipitate confusion that does not arise under current doctrine. The Justice Department further argued that rules for construing agency rules and the parameters on when an agency is permitted to issue preemptive rules under language in section 6(b) of the bill would engender confusion and could produce a volume of protracted and complicated litigation.

In late July, Health and Human Services Secretary Donna Shalala sent a separate letter opposing enactment of this bill, describing particular concerns that efforts to narrow preemption authority would weaken important consumer protection programs (e.g., FDA rules on medical devices, nutritional labels on food) whose effectiveness depends on nationally uniform rules and that burdensome and ambiguous procedural requirements for agency rulemaking will increase the costs and delays of regulations without providing meaningful public benefits. The National Resources Defense Council, the Sierra Club, and U.S. Public Interest Research Group also joined in a letter outlining similar objections to the bill.

I recognize that this federalism accountability proposal has attracted widespread support and that refinements made through amendments adopted during markup, particularly the deletion of section 6(c) regarding resolution of ambiguities in favor of State authority and a provision for agency exemption under emergency circumstances, have addressed some of the objections raised. However, I am concerned that some of the problems outlined above or raised to the committee may remain unaddressed and deserve continued discussion.

DICK DURBIN.

IX. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 1214, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no changes are proposed is shown in roman):

[From United States Code, Title 2—The Congress, Chapter 17—Congressional Budget Office]

CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974

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TITLE IV—ADDITIONAL PROVISIONS TO IMPROVE FISCAL PROCEDURES

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PART B—FEDERAL MANDATES

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SEC. 421. DEFINITIONS.

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(1) * * *

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(5) FEDERAL INTERGOVERNMENTAL MANDATE.—The term "Federal intergovernmental mandate" means—

(A) * * *

(B) any provision in legislation, statute or regulation that relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority, if the provision—

[(i)(I) would*]* *(i) would increase the stringency of conditions of assistance to State, local, or tribal governments under the program; or*

[(II) would*]* *(ii)(I) would place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding to State, local, or tribal governments under the program; and*

[(ii) the*]* *(II) the State, local, or tribal governments that participate in the Federal program lack authority under that program to amend their financial or programmatic responsibilities to continue providing re-*

quired services that are affected by the legislation, statute, or regulation.

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SEC. 423. DUTIES OF CONGRESSIONAL COMMITTEES.

(a) * * *

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(d) INTERGOVERNMENTAL MANDATES.—If any of the Federal mandates in the bill or joint resolution are Federal intergovernmental mandates, the report required under subsection (a) shall also contain—

(1)(A) * * *

(B) * * *

(C) if funded in whole or in part, a statement of whether and how the committee has created a mechanism to allocate the funding in a manner that is reasonably consistent with the expected direct costs among and between the respective levels of State, local and tribal government; [and]

(2) any existing sources of Federal assistance in addition to those identified in paragraph (1) that may assist State, local and tribal governments in meeting the direct costs of the Federal intergovernmental mandates[.]*; and*

(3) if the bill or joint resolution would make the reduction specified in section 421(5)(B)(ii)(I), a statement of how the committee specifically intends the States to implement the reduction and to what extent the legislation provides additional flexibility, if any, to offset the reduction.

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SEC. 424. DUTIES OF THE DIRECTOR; STATEMENTS ON BILLS AND JOINT RESOLUTIONS OTHER THAN APPROPRIATIONS BILLS AND JOINT RESOLUTIONS.

(a) FEDERAL INTERGOVERNMENTAL MANDATES IN REPORTED BILLS AND RESOLUTIONS.—For each bill or joint resolution of a public character reported by any committee of authorization of the Senate or the House of Representatives, the Director of the Congressional Budget Office shall prepare and submit to the committee a statement as follows:

(1) * * *

(2) * * *

(3) ADDITIONAL FLEXIBILITY INFORMATION.—The Director shall include in the statement submitted under this subsection, in the case of legislation that makes changes as described in section 421(5)(B)(ii)(I)—

(A) if no additional flexibility is provided in the legislation, a description of whether and how the States can offset the reduction under existing law; or

(B) if additional flexibility is provided in the legislation, whether the resulting savings would offset the reductions in that program assuming the States fully implement that additional flexibility.

(4) ESTIMATE NOT FEASIBLE.—If the Director determines that it is not feasible to make a reasonable estimate that would be required under paragraphs (1) and (2), the Director shall not

make the estimate, but shall report in the statement that the reasonable estimate cannot be made and shall include the reasons for that determination in the statement. If such determination is made by the Director, a point of order under this part shall lie only under section 425(a)(1) and as if the requirement of section 425(a)(1) had not been met.

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[From United States Code, Title 31—Money and Finance, Subtitle—The Budget Process, Chapter 11—The Budget and Fiscal, Budget, and Program Information]

GOVERNMENT PERFORMANCE AND RESULTS ACT

SEC. 1115. PERFORMANCE PLANS

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(g) When developing a performance plan under this section that includes a State-administered Federal grant program, the agency shall consult with public officials as defined under section 4 of the Federalism Accountability Act of 1999.

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